STATE OF MICHIGAN

COURT OF APPEALS

AAA MORTGAGE CORPORATION, Plaintiff-Appellant, v CHRISTOPHER P. LEGGHIO, ESQ., and NOVARA TESIJA MICHELA & PRIEHS, P.C., Defendants-Appellees.	UNPUBLISHED October 28, 2003 No. 239016 Oakland Circuit Court LC No. 01-030662-NM
AAA MORTGAGE CORPORATION, Plaintiff-Appellee, v CHRISTOPHER P. LEGGHIO, ESQ., Defendant-Appellant, and NOVARA TESIJA MICHELA & PRIEHS, P.C., Defendant-Appellee.	No. 240066 Oakland Circuit Court LC No. 01-030662-NM

Before: Hoekstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

In Docket No. 239016, plaintiff appeals as of right the circuit court's order granting summary disposition of its claims of equitable subrogation, indemnification and contribution in favor of defendants, Christopher P. Legghio, Esq. (Legghio), and Novara Tesija Michela & Priehs, P.C. (NTMP)[1]. In Docket No. 240066, defendant Legghio appeals as of right the circuit

[1] Legghio and NTMP are collectively referred to as "defendants."

court's order denying his motion for sanctions. Also at issue is a motion plaintiff filed during the pendency of this appeal, the resolution of which was deferred until the issuance of this decision.[2] We affirm in both cases.

I

Plaintiff AAA is in the business of selling and servicing residential loans under employee benefit programs. In 1993, the Board of Trustees of the Millwrights' Local 1102 Supplemental Pension Fund (Millwrights Fund) entered into a "Mortgage Service Agreement" with AAA. The program's purpose as stated therein was: "The Trustees wish to establish a Mortgage Investment Loan Program . . . to provide first lien fifteen year conventional residential mortgage loans to plan participants, as well as non-participants, to build, remodel, purchase or refinance their homes. AAA has been selected to be the administrator of that program." Defendant Legghio was the Millwrights' Fund second counsel.

In 1995, the Trustees of the Carpenters Pension Trust Fund (Carpenters Fund) and AAA entered into a similar agreement. The agreement provided that AAA "shall act as agent of [the Carpenters Fund] for the purpose of making loans to build, remodel, purchase or refinance residential property, obtaining a first lien mortgage on the principal place of residence of the borrower and servicing the mortgage loans once made." Defendant (NTMP) served as counsel for the Carpenters Fund.

A

The Department of Labor [DOL] investigated the trustees' management of the Funds and AAA's administration of the mortgage service agreements, and eventually brought suit against the Funds and their trustees for violations of ERISA, among other things. Documentary evidence submitted below included the following.

By letter dated October 10, 1997, the Department of Labor wrote AAA that it had "concluded its investigation of AAA Mortgage's activities as a service provider of [employee benefit] Plans [including the Carpenters and Millwrights.]" The letter continued:

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[2] In July 2003, AAA filed as supplemental authority an unpublished federal district court order dismissing a related federal case filed against AAA mortgage, *Trustees of the Carpenters' Pension Trust Fund-Detroit and Vicinity, and the Trustees of the Millwrights Local 1102 Supplemental Pension Fund v AAA Mortgage Corp*, case number 99-74123-CK (ED MI, 2003). Defendant Legghio opposed plaintiff's motion, arguing that unpublished opinions may not be cited in supplemental authority briefs under MCR 7.212(F)(3). Legghio also argued that plaintiff should not be allowed to expand the record on appeal by submitting the order.

This Court notified plaintiff that because the order was unpublished, plaintiff would have to file a motion for permission to file an unpublished order. Plaintiff then filed a motion for immediate consideration for permission to file the district court's unpublished order, as supplemental authority under MCR 7.212. At oral argument before this Court several days later, the parties agreed that resolution of plaintiff's motion would be deferred until the issuance of this decision.

Based on the facts gathered in this investigation, and subject to the possibility that additional information may lead us to revise our views, it appears that, as a service provider, AAA Mortgage may have violated several provisions of ERISA. The purpose of this letter is to advise you of or findings and to give you an opportunity to comment before the Department determines what, if any, action to take.

As we understand the facts, many of which were provided by you to this office during the course of our investigation, AAA Mortgage receives and processes applications for conventional owner-occupied residential mortgage loans on behalf of the Plans and is fully responsible for determining to whom a mortgage loan shall be granted or denied. AAA Mortgage is also responsible for the day-to-day administrative activities relating to each mortgage loan including the collection of all outstanding principal and interest payments. Thus, AAA Mortgage exercises discretion with respect to matters involving the Plans and, therefore, is a fiduciary within the meaning of ERISA section 3(21) in addition to being a party in interest within the meaning of ERISA section 3(14).

In 1993, AAA Mortgage entered into a Mortgage Service Agreement (MSA) with the Millwrights [Pension Fund] to administer 15 year conventional residential mortgages on behalf of the Millwrights Pension Fund. On February 10, 1994, Ronald M. Krochmalny, a trustee of the Millwrights Pension Fund, along with his wife, Marie R. Krochmalny, refinanced their home mortgage loan in the amount of $118,500.00 through AAA Mortgage with the mortgage proceeds being supplied by the Millwrights Pension Fund. The term of this mortgage runs from April 1, 1994 through March 1, 2014, a period of twenty years. In addition, during his mortgage refinancing process, Ronald M. Krochmalny was not assessed certain closing costs that were charged to all other mortgagors whose loans were financed by the Millwrights Pension Fund. . . . Additionally, no credit report or other evidence of either Ronald M. or Marie R. Krochmalny's credit history was contained in the mortgage loan file.

After our investigation was initiated, Marie R. Krochmalny remitted a check . . . in . . . the amount of closing costs which were "waived" at the time of the mortgage refinancing. . . However, the term of the Krochmalny mortgage loan remains at 20 years which is 5 years beyond the MSA mandated maximum length of 15 years and no written modifications have been made to the MSA to allow for mortgage loans in excess of 15 years. In addition, our investigation identified no other mortgage loans financed by the Millwrights Pension Fund which exceed a term of 15 years.

It is our view that the failure to review the Krochmalny credit history in the mortgage loan approval process, the approval of the Krochmalny mortgage loan with terms more favorable than that allowed by the MSA, the failure to bring the terms of the Krochmalny mortgage loan into compliance with the requirements of the MSA and the failure to collect those additional monies which would have been received by the Millwrights Pension Fund had the Krochmalny mortgage

loan been in compliance with the requirements of the MSA violate ERISA sections 404(a)(1)(A), (B) & (D), and 406(a)(1)(B) & (D) . . .

* * *

Pursuant to the terms and conditions of the MSA, AAA Mortgage "warrants and represents" that each mortgage loan financed by the Millwrights Pension Fund satisfies all requirements for sale to the . . . Fannie Mae, Ginnie Mae and Freddie Mac. . . Furthermore, in its publication entitled "Invest in the Best [-] Home Loans for Union Members," AAA Mortgage discloses that, as part of the mortgage approval process, it will, among other things, verify the amount of a borrower's income in addition to the assets used by the borrower for the down payment, closing costs, and other expenses incurred in acquiring the property to be mortgaged.

Our investigation disclosed that, during the application and approval process for a mortgage loan financed by any of the Plans, it is the general practice of AAA Mortgage to estimate the borrower's annual income by utilizing the standard journeyman hourly pay rate contained in the borrower's respective collective bargaining agreement rather than to require independent verification of the borrower's actual employment and income for the prior two years despite the fact that, historically, many of the borrowers employed in the building trades industry are not employed on a consistent basis throughout the year. In addition, AAA Mortgage does not require verification of the source of the borrower's down payment on the property, private mortgage insurance for first mortgages when the loan-to-value ratio exceeds 80% or recertification of a property appraisal which is more than 120 days old. Additionally, AAA mortgage does not reserve the right to revoke, at any time and for any reason, its agreement to waive the borrower's escrow of property taxes and insurance premiums. Each of these practices is inconsistent with Fannie Mae mandated underwriting principles. Those mortgage loans financed by the Plans which do not meet the mandated eligibility criteria do not qualify for sale to Fannie Mae. In addition, those mortgage loans financed through the Millwrights Pension Fund which do not meet the Fannie Mae eligibility criteria also fail to meet the specific terms and conditions of the Millwrights Pension Fund MSA.

It is our view that the failure of AAA Mortgage to verify, during the mortgage approval process, the employment and income history of the borrower in addition to the assets used by the borrower for the down payment, closing costs, and other expenses incurred in acquiring the property to be mortgaged and the failure of AAA Mortgage to adhere to the provision of the Millwrights Pension Fund MSA regarding all requirements for sale of mortgage loans to Fannie, Mac, Ginnie Mae and Freddie Mac violate ERISA sections 404(a)(1)(A), (B) & (D) as previously cited.

Our investigation also disclosed that AAA Mortgage maintains, in its name only, a fidelity bond with a single loss liability limitation of $500,000.00 and a single loss deductible of $10,000.00. Furthermore, the fidelity bond does not include

any of the Plans as additional named insureds, does not include any riders which would allow recovery by the Plans of any losses incurred and does not allow for recovery by each Plan in an amount at least equal to that which would be required if each Plan was bonded separately. In addition, we are aware that, at the very least, the fidelity bond of the Millwrights Local No. 1102 Supplemental Pension Fund does not provide coverage to AAA Mortgage.

It is our view that the inclusion of a loss deductible amount other than zero on the fidelity bond, the failure to name the Plans as additional insureds under the fidelity bond and the failure to maintain the fidelity bond coverage in an amount at least equal to that which would be required if each Plan was bonded separately violates ERISA section 412(a) . . .

* * *

In our view, for the reasons cited above, you are in violation of ERISA and will remain so until: (1) the terms and conditions of the Ronald M. and Marie R. Krochmalny mortgage loan are brought into compliance with the Millwrights Pension Fund MSA including the restoration of the inappropriately amortized interest and principal payments plus lost interest and opportunity costs, 2) those mortgage loans financed through the Millwrights Pension Fund are brought into compliance with the Millwrights Pension Fund MSA; 3) policies and procedures are established to verify, during the mortgage approval process, the employment and income history of the borrower in addition to the assets used by the borrower for the down payment, closing costs, and other expenses incurred in acquiring the property to be mortgaged; and 4) the proper amount of coverage is secured for the fidelity bond along with the addition of the Plans as named insureds and the elimination of any deductible provision. Therefore we invite you to discuss with us immediately how this violation may be corrected and the losses restored to the Plan.

We have provided the foregoing statement of our views to help you evaluate your obligations as a fiduciary within the meaning of ERISA. Your failure to correct the violation and restore losses may result in the referral of this matter to the Office of the Solicitor of Labor for possible legal action. . . .

If you take proper corrective action the Department will not bring a law suit with regard to these issues. However, ERISA section 502(1) requires the Secretary of Labor to assess a civil penalty against a fiduciary who breaches a fiduciary responsibility under, or commits any other violation of, part 4 of Title I of ERISA . . . .

B

By letter dated June 14, 1999, the DOL wrote the Board of Trustees of the Carpenters Fund, stating it had concluded its investigation of the Fund's employee benefit plan, was advising the Fund of its findings and giving the Fund opportunity to comment before determining what action to take, if any:

Since executing the Agreement [with AAA in 1995], the Plan has made mortgage loans to both Plan participants and to certain non-participants. Since executing the Agreement, the Plan has made mortgage loans through [AAA] to participants, some of whom are parties in interest within the meaning of ERISA section 3(14). In addition, some of the participants who received mortgage loans did "bargain, sell, transfer, assign and set over" their present and future interest in benefits from the Plan as additional security for the loans. Further, Trustee Joseph J. Gambino, Jr., who is also a Plan participant, received a mortgage loan from the Plan through [AAA].

Additionally, our investigation disclosed that there is no specific provision in the documents of the Plan which authorizes the making of loans to parties in interest who are participants or beneficiaries. Further, Article V, Section 2 of the Plan's Agreement and Declaration of Trust states that ". . . no benefit payable or to become payable therefrom shall be subject in any manner to anticipation, alienation, sale, transfer, assignment . . ." In addition, as of February 15, 1999, only 198 out of more than 15,000 participants have received mortgage loans from the Plan. Additionally, you have limited the total amount of mortgage loans available from the Plan through [AAA] so that, as of today, additional mortgage loans are not available.

ERISA provides for exemptive relief from the prohibitions of section 406 applicable to the lending of money or other extension of credit between a plan and a party in interest. . . .

* * *

This exemptive relief is not available for the above-referenced transactions, however, because the loans were not available to all participants and beneficiaries on a reasonably equivalent basis and the loans were not made in accordance with specific provisions regarding such loans set forth in the Plan.

Absent exemptive relief, it is our view that the making of loans from the Plan to those participants who are parties in interest, including Trustee Joseph J. Gambino, Jr., and allowing participants to assign their present and future interest in Plan benefits as additional security for loans from the Plan violate ERISA sections 404(1)(A), (B) & (D), 406(a)(1)(B) & (D) and 406 (b)(1) & (b)(2) . . .

* * *

In addition, our investigation disclosed that the written instruments establishing the Plan make no reference to a "named fiduciary." It is our view that the failure to specify one or more named fiduciaries in the Plan's trust agreement or plan document violates ERISA section 404(a)(1)(B) . . . and 402(a)(1) & (2). . .

* * *

> Our investigation also disclosed the existence of errors and omission on the Plan's annual report Form 5500. . . .
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> * * *
>
> In our view, for the reasons cited above, you are in violation of ERISA and will remain so until: 1) you reverse the prohibited transactions involving the mortgage loans made through the AAA Mortgage Corporation to those participants who are parties in interest and restore to the Plan any resulting expenses and losses, 2) you amend the documents of the Plan to include one or more "named fiduciaries," 3) you develop and implement a strategy to ensure that the Plan and its participants and beneficiaries are not adversely affected by the Year 2000 Problem, and 4) you file amended annual report Forms 5500 for plan years ended April 30, 1995 through April 30, 1998 correcting those errors and omissions described above. . . .
>
> We have provided the foregoing statement of our views to help you evaluate your obligations as a fiduciary within the meaning of ERISA. Your failure to correct the violation and restore losses may result in the referral of this matter to the Office of the Solicitor of Labor for possible legal action. . . . Further, even if the Secretary decided not to take any legal action in this matter, you would nonetheless remain subject to suit by other parties including plan fiduciaries and plan participants or their beneficiaries.
>
> If you take proper corrective action the Department will not bring a law suit with regard to these issues. . . .

By letter dated June 25, 1999, the Carpenters Fund gave AAA notice that it was terminating its agreement with AAA in thirty days.

In January 2000, the Department of Labor (DOL) filed suit against the Carpenters Fund and nine trustees of the Carpenters Fund under the Employee Retirement Income Security Act (ERISA), 29 USC § 1001, *et seq.*, in the United States District Court for the Eastern District of Michigan, alleging:

> 7. During the time period relevant to this action, the trustees delegated to AAA Mortgage Corporation ("AAA") through a contract entered into on September 27, 1995, authority to make mortgage loans from the Plan's assets to non-participants and participants of the Plan. The participants who received mortgage loans from the Plan were parties in interest to the Plan, within the meaning of § 3(14)(H) of the Act, as the participants were employees of employers whose employees are covered by the Plan.
>
> 8. During the time period relevant to this action, the trustees knew or should have known that the Plan did not provide for mortgage loans to participants, yet the trustees contracted with AAA to make first lien mortgage loans from Plan assets to participants as well as to non-participants.

9. During the time period relevant to this action, the trust's governing documents with respect to the assignment of benefits provided, in pertinent part:

> No benefits payable at any time under the Plan shall be subject in any manner to alienation, sale, transfer, assignment, pledge, attachment or encumbrance of any kind. Any attempt to alienate, sell, transfer, assign, pledge or otherwise encumber any such benefit, whether presently or thereafter payable, shall be void.
>
> * * *
>
> No asset of the Trust Fund and no benefit payable or to become payable therefrom shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumberance [sic], garnishment, lien or charge of any kind by any employer, employee or former employee of any employer, participant, beneficiary or any other person, governmental agency, firm or corporation and any attempt to cause any asset or benefit payable or to become payable to be subject thereto shall be null and void.

10. During the time period relevant to this action, AAA accepted as additional collateral for the participants' home mortgage loans pledges of participants' interests in their vested accrued benefits in the Plan although such pledges would be null and void under the trust's provisions set forth in paragraph 9 *supra*.

11. During the period from October 1, 1995 to date, the Plan has provided mortgage loans to approximately 233 participants in the Plan. The total principal amount of these participant loans is $14,752,471.48.

12. By the conduct described in paragraphs 7 and 11 above, the trustees caused the Plan to engage in transactions:

> a. they knew or should have known constituted a direct or indirect lending of money or other extension of credit between the Plan and a party in interest, in violation of ERISA § 406(a)(1)(B), 29 U.S.C. § 1106(a)(1)(B); and
>
> b. caused the Plan to engage in a transaction that they knew or should have known constituted a direct or indirect transfer of plan assets to, or use of plan assets by or for the benefit of, a party in interest in violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D),

13. By the conduct described in paragraphs 7 through 11 hereof, the trustees failed to discharge their duties with respect to the Plan solely in the interests of the participants and beneficiaries in accordance with the documents and instruments governing the Plan insofar as such documents and instruments are consistent with ERISA, in violation of ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

The DOL's complaint sought as relief:

> A. Permanently enjoining all defendants from violating the provisions of Title I of ERISA;
>
> B. Ordering each defendant to make good to the Plan any losses, including interest, resulting from fiduciary breaches committed by such defendant or for which such defendant is liable;
>
> C. Ordering each defendant to correct the prohibited transactions in which the Plan engaged, plus appropriate interest;
>
> D. Awarding the Secretary [of the DOL] the costs of this action; and
>
> E. Ordering such further relief as is appropriate and just.

C

In August 2000, the DOL filed suit against the Millwrights Fund, several trustees of the Fund, and others not at issue here. The DOL alleged regarding the pension fund:

> 38. The Pension Fund's plan document provides for the lending of Pension Fund money to participants. Article IV, Sec. 6 of the Pension Fund's plan document governs participant loans. This section provides that loans may be made to participants in an amount not to exceed the lesser of "40% of the present value of the participant's vested account balance" or "$50,000 reduced by the excess, if any, of the highest outstanding balances of all other loans from the Plan during the one-year period ending on the day before the loan was made, over the outstanding balance of loans from the plan on the date on which such loan was made." Furthermore, the period of repayment shall not exceed five years, and each loan shall be collateralized by the assignment of the participant's vested account interest "to the extent of the borrowed amount."
>
> 39. In 1993, the Pension Fund entered into an agreement with AAA Mortgage Corporation wherein the Pension Fund transferred money to AAA and AAA would provide "first lien fifteen year mortgages" to participants and others. Participants could borrow up to 95% of the appraisal value of their homes, provided they pledge as collateral up to 50% of the present value of their vested account balances. This agreement did not specify the maximum loan amount; in practice, however, loans in excess of $50,000 were given to participants.
>
> 40. The terms of several mortgage loans were inconsistent with the Pension Plan document. For example, several mortgage loans were in excess of the amount permitted and the repayment period of all loans exceeded the five years permitted by the Pension Plan document.
>
> 41. The trustees failed to adequately monitor these mortgage loans and the mortgage program.

42. Defendants Mabry and Krochmalny had mortgages through the above-mentioned mortgage program which did not comply with the terms of the Pension Plan document in that they exceeded the amount permitted and/or exceeded the five-year repayment period established by the Pension Plan document.

43. Other individuals who were parties in interest to the Plans within the meaning of Sec. 3(14)(H), 29 U.S.C. 1002(14)(H), had mortgages through the above-mentioned mortgage program which did not comply with the terms of the Pension Plan document in that they exceed the amount permitted and/or exceeded the five-year repayment period established by the Pension Plan document.

44. By the conduct described in paragraphs 38 through 43 above, defendants Mabry, Moore, Krochmalny, Scrutton, Woodbeck and Shields:

a. failed to discharge their duties with respect to the Pension Fund solely in the interests of the participants and beneficiaries and in accordance with the documents and instruments governing the plan in violation of ERISA Sec. 404(a)(1)(D), 29 U.S.C. Sec. 1104(a)(1)(D);

b. caused the Pension Fund to engage in a transaction that they knew or should have known constituted a direct or indirect lending of money or other extension of credit between the plan and a party in interest in violation of ERISA Sec. 406(a)(1)(B), 29 U.S.C. Sec. 1106(a)(1)(B); and

c. caused the Pension Fund to engage in transactions that they knew or should have known constituted a direct or indirect transfer to, or use by or for the benefit of, a party in interest, of any assets of the Plan in violation of ERISA Sec. 406(a)(1)(D), 29 U.S.C. Sec. 1106(a)(1)(D).

The DOL requested as relief that the individual defendants named in paragraph 44 be permanently enjoined from violating Title I of ERISA; that these defendants be ordered to make good to the Plan any losses, including interest, resulting from fiduciary breaches; order each defendant trustee to correct the prohibited transactions, restore any losses to the Plans, and pay appropriate interest; and permanently enjoin these defendant from serving as fiduciaries or service providers to any ERISA-covered employee benefit plan.

The DOL's complaint against the Carpenters Fund resulted in a consent order dated October 23, 2000, under which National City Bank was appointed as an independent fiduciary with sole responsibility for the management, administration and disposition of those plan assets that consist of mortgages issued to participants in the Pension Plan by AAA. The consent order required the individual defendant trustees to pay $12,600 to the Pension Plan to compensate it for expenses incurred by National City Bank to reappraise the property held as security on certain loans. The consent order stated that the amount of $12,600 "shall be deemed the only 'applicable recovery amount' for purposes of any penalty assessment pursuant to ERISA § 502(1) in this litigation."

D

In December 2000, the trustees of the Millwrights and Carpenters filed suit against AAA in federal district court, alleging breach of fiduciary duties under ERISA, breach of fiduciary duties under state law, breach of contract, fraud and misrepresentation, "claim and delivery," misappropriation of trade secrets, and conversion.[3]

During the pendency of this appeal, plaintiff AAA filed as supplemental authority an unpublished federal district court order dated July 1, 2003, dismissing the Funds' federal suit against AAA, *Trustees of the Carpenters' Pension Trust Fund-Detroit and Vicinity, and the Trustees of the Millwrights Local 1102 Supplemental Pension Fund v AAA Mortgage Corp,* case number 99-74123-CK (ED MI, 2003). Defendant Legghio opposed plaintiff's motion, arguing that unpublished opinions may not be cited in supplemental authority briefs under MCR 7.212(F)(3). Legghio also argued that plaintiff should not be allowed to expand the record on appeal by submitting the order. This Court notified plaintiff that because the order was unpublished, plaintiff would have to file a motion for permission to file an unpublished order. Plaintiff then filed a motion for immediate consideration for permission to file the district court's unpublished order, as supplemental authority under MCR 7.212. At oral argument before this Court several days later, the parties agreed that resolution of plaintiff's motion would be deferred until the issuance of this decision.

The federal district court's order dismissed the plaintiff Funds' claims of breach of fiduciary duty on statute of limitations grounds, noting:

> [M]aterials provided to the [Millwrights] trustees during the discussion [with AAA's president, John Reddam, in 1993] show that the Fund would have to take certain steps to permit the pledging of pension benefits as collateral to avoid a prohibited transaction under ERISA. The materials envisioned that the Millwrights "adopt the necessary resolution into the Trust Agreement, permitting the participant's [*sic*] to pledge up to 50% of their present value of vested accrued pension benefit at the time of loan application. Thus, not only did the Millwrights know that pensions would be pledged; but they knew that their internal plan documents would have to be amended, and, if they were not amended, that the trustees—the fiduciaries of the pension trust fund—might be engaging in prohibited transactions when they purchased loans from AAA Mortgage containing a pledge of pension funds. . . .
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> * * *
>
> The trustees of the Carpenters' Fund also knew the aspects of the program before signing their agreement with AAA Mortgage in 1995 . . . . the presentation materials provided that the Carpenters' Fund would be required to amend their initial plan documents . . . .

[3] Several of these claims were related to AAA's alleged failure to turn over records to the Funds once AAA's services had been terminated.

* * *

> The Funds argue that the court should apply ERISA's six-year statute of limitations because this is a case involving "fraud or concealment." . . . However, this is simply not a case involving fraud or concealment as contemplated by ERISA. There can be no question that from the very inception of the program, the funds' trustees themselves, as well as their attorneys, knew the terms embodied in the mortgage program and the manner in which it would be administered. . . . Thus, Plaintiffs' claims for breach of fiduciary duty are time barred by the three-year statute of limitations . . . .
>
> The remainder of Plaintiffs' claims are state law claims that must be dismissed because they are preempted by ERISA. Pursuant to . . . § 514, the statute preempts all state law claims to the extent they "relate to any employee benefit plan." . . . .
>
> In this case all of Plaintiffs' state law claims are preempted by ERISA because they are based upon obligations arising from AA's alleged "fiduciary" relationship to the Funds and/or from the underlying basis of Count I of the FAC [first amended complaint]. Count III for breach of contract, for example, is based upon the same allegations used to support the ERISA claim in Count I and seeks the same relief . . . .

E

In the interim, the circuit court in the instant case dismissed all of AAA's claims. On appeal, plaintiff challenges the dismissal of its claims of equitable subrogation, indemnification and contribution. Defendants filed a motion for sanctions against plaintiff for bringing a frivolous action. The circuit court denied the motion. These appeals ensued.

II

Plaintiff first challenges the circuit court's dismissal of its equitable subrogation claim, arguing that the circuit court erroneously held that there was no mutuality of interest between AAA and the Funds. Plaintiff contends that defendants, as attorneys for the Funds, had sole responsibility and authority to make the necessary amendments to the Funds' internal Plan Documents that would allow implementation of plaintiff's programs, but failed to do so, and that both AAA and the Funds reasonably relied on defendants to do so. Plaintiff argues that it thus had a mutuality of interest with defendants' clients with regard to the particular issue of having the Plan Documents properly amended so as to allow the mortgage program to be implemented in compliance with ERISA. Plaintiff asserts that the circuit court erroneously failed to focus on that particular issue and, instead, ruled that because all potential conflicts of interest were not eliminated by plaintiff, the claim failed.

The circuit court's opinion stated as to plaintiff's equitable subrogation claim:

> The issue before this Court is whether Plaintiff's interest merged with those of the Defendants' clients such that "the potential for conflict of interest was

> eliminated". In the present case, the Plaintiff cannot assert that it could have hired the Defendants to represent it and actively consult with the Defendants regarding the Fund's [sic] interest. AAA's interest was of a personal financial interest. Specifically, it was to make money based upon the "total outstanding principle [sic] balance of all outstanding mortgage loans issued by the program." Clearly, this was a diverse interest of the Defendants' clients. The Fund's financial interest in the mortgage program was to prudently invest fund monies. The Fund trustees' obligations were to act "solely in the interests of the plan participants and beneficiaries." 29 U.S.C. 1104(a)(1)[.] This Court finds that there was never a merger of interests; and, based upon the supporting evidence, all potential conflict of interests [sic] were never eliminated. As a result, the Plaintiff's and Defendants' Motions are denied and granted, respectively.

A

This Court reviews de novo the circuit court's grant of summary disposition. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id*. When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley,* 461 Mich 73, 76; 597 NW2d 517 (1999). Summary disposition is proper when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

"Generally, a legal malpractice action may be brought only by a client who feels that he has been damaged by retained counsel's negligence." *Beaty v Hertzberg & Golden, PC,* 456 Mich 247, 253; 571 NW2d 716 (1997), citing 7 Am Jur 2d, Attorneys at Law, § 249, p 268; and *Friedman v Dozorc,* 412 Mich 1, 23-25; 312 NW2d 585 (1981).

> There has been a reluctance to permit an attorney's actions affecting a nonclient to be a predicate to liability because of the potential for conflicts of interest that could seriously undermine counsel's duty of loyalty to the client. [Citing *Friedman, supra, Atlanta Int'l Ins Co v Bell,* 438 Mich 512; 475 NW2d 294 (1991), and Anno: *Attorney's liability, to one other than immediate client, for negligence in connection with legal duties,* 61 ALR4th 615, § 8, pp 634-645.]
>
> Yet, this Court has recognized that an attorney's negligence may expose him to liability to third parties under certain circumstances. One vehicle for affording relief has been the doctrine of equitable subrogation. *Atlanta Int'l, supra* at 522.

"[E]quitable subrogation is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other." *Auto-Owners Ins v Amoco Production,* 468 Mich 53, 59; 658 NW2d 460 (2003), quoting *Commercial Union Ins Co v Medical Protective Co,* 426 Mich 109, 117; 393 NW2d 479 (1986) (opinion by Williams, C.J.) The doctrine of equitable subrogation

> is best understood as allowing a wronged party to stand in the place of the client, assuming specific conditions are met. Those conditions are: (1) a special relationship must exist between the client and the third party in which the potential for conflicts of interest is eliminated because the interests of the two are merged with regard to the particular issue where negligence of counsel is alleged, (2) the third party must lack any other available legal remedy, and (3) the third party must not be a "mere volunteer," i.e., the damage must have been incurred as a consequence of the third party's fulfillment of a legal or equitable duty the third party owed to the client. [*Beaty, supra* at 254-255. Citations omitted.]

The *Beaty* Court also noted:

> *We have recognized the applicability of equitable subrogation as a basis for a claim of attorney negligence by someone other than the client only in the context of the unique relationship among an insurer, the insured, and counsel for the insured*. In *Atlanta Int'l, supra* at 520, n 8, we observed that "the unique tripartite insurance context presents an analytically different public policy" from that which controlled our decision in *Friedman, supra.* Indeed, the focus of the Court's attention in that case was on "vindicating [the] public policy rationale that undergirds the attorney-client relationship in the insurance defense context." *Atlanta Int'l* at 520. One issue framed by the parties here is whether the plaintiff meets the requirements of the doctrine of equitable subrogation. While we do not discern any significant unique public policy considerations similar to those presented in *Atlanta Int'l*, in accordance with the parties' submissions, we consider whether equity requires application of the doctrine by examining whether plaintiff meets the conditions set out as justifying application of the doctrine in *Atlanta Int'l. Our analysis here should not be interpreted as implicitly authorizing expansion of the doctrine's application to attorney negligence cases outside the insurance defense context.* [*Beaty*, 456 Mich at 254 n 5. Emphasis added.][4]

B

Plaintiff asserts that the facts giving rise to a finding of a "special relationship or merger of interests" in *Beaty, supra,* are analogous to the facts in the instant case. We do not agree.

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[4] 23 Michigan Civil Jurisprudence, Subrogation, § 4, pp 6-7, provides:

> Equitable subrogation is a flexible, elastic doctrine and, thus, its application should and must proceed on the case-by-case analysis characteristic of equity jurisprudence. The mere fact that the doctrine of subrogation has not been previously invoked in a particular situation is not a prima facie bar to its applicability.

Thomas Beaty was the majority shareholder in B & K Hydraulic Company, a firm that was forced into involuntary bankruptcy by creditors. The plaintiff was his wife. The Defendants in *Beaty* were attorneys for the bankruptcy trustee of B & K. Thomas Beaty bought two life insurance policies in 1985; one listed the plaintiff as a beneficiary, and the second listed B & K. In 1986, the Beatys transferred a property they had owned as husband and wife to B & K. Mr. Beaty later died, and the plaintiff and B & K's trustee submitted claims on his life insurance policies, both of which the insurer denied on the ground that the policies had lapsed for Mr. Beaty's failure to pay his monthly installments. The plaintiff, Mrs. Beaty, filed suit against the insurer alleging it was estopped from denying her claim because it previously accepted late payments. The insurer moved for summary disposition, but the plaintiff prevailed and was awarded the benefits.

The plaintiff requested the B & K trustee to file a similar suit against the insurer in order that proceeds derived therefrom could be applied to the B & K estate and sale of the property could be avoided. The defendants, the trustee's attorneys, filed suit but did not raise the estoppel issue and obtained no recovery from the insurer. The plaintiff brought suit against the trustee's attorneys, asserting they were liable on an equitable subrogation theory even though they were not her attorneys. With little discussion, the Supreme Court concluded that the plaintiff and the trustee had a unity of interest with regard to the issue of maximizing the bankruptcy's estate assets, as they both stood to benefit, but denied the equitable subrogation claim on another ground—that the plaintiff had an adequate remedy at law:

> As to the first condition [special relationship/merger of interests], plaintiff contends that her interests and those of the trustee were merged with regard to recovery of the life insurance policy proceeds, that is, the parties shared an interest in maximizing the assets of the bankruptcy estate so that the potential for conflict was eliminated in that aspect of the litigation. We agree that there was such a shared interest solely with regard to recovery of the insurance policy proceeds and that, for the purposes of this test, plaintiff has shown that the first condition is satisfied. [*Beaty, supra* at 255.]

F

We conclude that plaintiff failed to establish that the requisite unity of interest existed between AAA and the Funds. *Beaty, supra,* cautioned against extending the doctrine of equitable subrogation to attorney negligence claims outside of the insurance defense context and we conclude that this case does not present circumstances that would warrant such an extension. As stated in *Atlanta Int'l Ins, supra*:

> The relationship between the insurer and the retained defense counsel, while less than a client-attorney relationship, unquestionably differs from the relationship between a defense counsel and a party-opponent. The relationship differs because "[l]iability insurance policies typically include provisions that both obligate the insurer to provide the insured with a defense and entitle the insurer to control the defense . . . [;] the insurer has both a 'duty' and a 'right' in regard to the defense of the insured . . . . " It has been appropriately recognized the "[defense counsel] occupies a fiduciary relationship to the insured, as well as to the insurance company . . . [and] implicitly, if not explicitly, represents to the insured the ability

> to exercise professional competence and skill in conducting the insured's defense." Furthermore, because the insurance company, not the client, is required to satisfy a judgment arriving from a defense counsel's malpractice, the client has no real incentive to sue defense counsel. [438 Mich at 519.]

These circumstances are absent in the instant case. The record before us does not support that the Funds or defendants, attorneys for the Funds, undertook to amend the plan documents for the benefit of anyone other than the Funds. There is no duality here as there is in the insurance defense context, where the insurer must defend the insured and can control the defense of the insured. AAA had no general obligation to indemnify the Funds, and AAA had no liability to the Funds except liability that would be based on AAA's own breaches. It in no sense paid a debt for which the Funds were responsible, or satisfied an obligation of the Funds.

We also note that the equitable subrogation doctrine allows "a wronged party to stand in the place of the client" (assuming the conditions discussed above are met). In this case, however, both AAA and the trustees of the Funds did "wrong." The DOL's investigation uncovered that certain of AAA's business practices (and certain conduct of individual trustees of the Funds, and the administration of the Funds) fell short of complying with various federal regulations, ERISA, and, in some cases, the Funds' Plans. Most of these flawed business practices had no relation to the issue of amending the MSAs. Thus, even had defendants amended the MSA as plaintiff urges, for example, to provide for twenty-year loans, the trustees' administration of the Funds and AAA's management of the MSAs would likely have been subject to federal investigation. Lastly, the relief sought by AAA was not the relief that would be sought by defendants' clients (the Funds). Rather, AAA sought to be indemnified for the cost of any recovery by the Funds against AAA and for the costs, attorney fees and interest incurred in defending against the federal suit brought against AAA by the Funds.[5]

III

Plaintiff next argues that the circuit court improperly relied on the complaint in the federal court action to determine its right to common-law indemnification because defendants drafted a self-serving complaint on behalf of their clients to conceal their alleged malpractice.

"[T]he right to common-law indemnification is based on the equitable theory that where the wrongful act of one party results in another party's being held liable, the latter party is entitled to restitution for any losses. *Lakeside Oakland Development, LC v H & J Beef Co*, 249 Mich App 517, 531; 644 NW2d 765 (2002), citing *North Community Healthcare, Inc v Telford*, 219 Mich App 225, 227; 556 NW2d 180 (1996).

We agree with the circuit court that plaintiff's claim fails because "a party may not seek indemnity under the common law or an implied contract where the primary complaint alleges active, rather than passive, liability." *Oberle v Hawthorne Metal Prod Co,* 192 Mich App 265,

[5] As discussed *supra*, the Funds' federal suit against AAA was dismissed during the pendency of this appeal. Although that determination may be appealed, at this point and on this record, it appears that the only damages at issue here are AAA's attorney fees.

270; 480 NW2d 330 (1991). The circuit court was not obligated, as plaintiff submits, to look beyond the allegations in the federal suit. *Id.* On the record before the circuit court, its determination was proper.

IV

Plaintiff next argues that the circuit court erroneously applied the Michigan Tort Reform Act and dismissed its contribution claim, because it is not seeking personal-injury type damages and the Act is not applicable when, as here, a plaintiff seeks only economic damages in a commercial dispute. We disagree.

A ruling on a motion for summary disposition based on a failure to state a claim is reviewed de novo on appeal. *Beaty, supra,* 456 Mich 253. All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions which can be drawn from the facts, and construed in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id*.

Plaintiff asserted a right to contribution under MCL 600.2925a, which provides in pertinent part:

> Except as otherwise provided in this act, when 2 or more persons become jointly or severally liable in tort for the same injury to a person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

In *Holton v A+ Ins Assoc, Inc,* 255 Mich App 318, 322-324; 661 NW2d 248 (2003), the cause of action at issue was negligent procurement of insurance coverage. This Court concluded that MCL 600.2956 applied to that cause of action, holding that MCL 600.2956 applies to all torts, and not only to those seeking damages for personal injury, property damage, or wrongful death. Thus, plaintiff's argument fails and its contribution claim was properly dismissed.

V

Plaintiff next argues that the circuit court erred by allowing defendant Legghio to testify at the summary disposition hearing, but denying plaintiff an opportunity to cross-examine Legghio or rebut his testimony through documentary evidence.

Decisions concerning whether a trial court conducted a proper hearing are reviewed for an abuse of discretion. *Fast Air, Inc v Knight*, 235 Mich App 541, 550; 599 NW2d 489 (1999). An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000). The opportunity to be heard guaranteed by due process does not require a full trial-like proceeding, but it does require a hearing to allow a party the chance to know and respond to the evidence. *Hanlon v Civil Service Commission*, 253 Mich App 710, 723; 660 NW2d 74 (2002).

We conclude that error, if any, was harmless. The circuit court specifically stated that it "will not take into consideration any of [] Legghio's statements made on the record for purpose of this Opinion and Order."

Plaintiff also argues that the circuit court improperly stayed discovery, resulting in prejudice to plaintiff. Under the circumstances presented here, we disagree.

Although plaintiff maintains that investigation of its claims was stymied by the circuit court's stay, plaintiff had filed a cross-motion for summary disposition under MCR 2.116(C)(10) before the circuit court entered the stay, apparently satisfied that the documentary evidence already available to it at that time entitled plaintiff to summary disposition. We find no abuse of discretion. MCR 2.302(C).

VI

In Docket No. 240066, Legghio argues that the circuit court improperly denied his motion for sanctions because plaintiff's claim was frivolous. We disagree.

A trial court's decision that a claim is not frivolous and thus not subject to sanctions is reviewed for clear error. *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 203; 650 NW2d 364 (2002). A trial court's decision is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Costs and Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002). MCL 600.2591(1) states, in relevant part:

> Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

Further, MCL 600.3591(3), provides:

> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.

MCR 2.114(D) states that "[t]he signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that,"

> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by

existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The facts of this case were not disputed in any significant manner, and there was no evidence below that plaintiff sought to harass or cause unnecessary delay or cost in the litigation. Rather, the record supports that plaintiff's counsel believed that a viable argument for equitable subrogation existed under *Beaty*. While we have rejected this argument, we believe it was a plausible legal argument made in good faith. We conclude that the circuit court did not clearly err in denying Legghio's motion for sanctions.

We affirm the circuit court's order granting defendants' motions for summary disposition in Docket No. 239016, and affirm the order denying sanctions in Docket No. 240066.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White